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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 821

RICHARD F. SAVELLI,
Petitioner,
vs.
BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division One, Civil Proceeding Numbered 21492, Reported as 229 Advance California Appellate Reports 169; ..... Cal. Rptr. .....

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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to the District Court of Appeal, State of California, First Appellate District, Division One, Civil Proceeding Numbered 21492, Reported as 229 Advance California Appellate Reports 169; ..... Cal. Rptr. .....

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, State of California, First Appellate District, Division One, heretofore entered in the above-entitled cause.

PART ONE: PRELIMINARY STATEMENT AND REFERENCE TO DECISION UNDER REVIEW.

Petitioner, herein called petitioner, is a citizen of the United States and of the State of California

therein and petitions for review of the judgments of the courts of the latter state upon the grounds that the proposed decisions of such courts deny petitioner due process of law and equal protection of the laws in violation of the Constitution of the United States, particularly of Article Fourteen of Amendments thereto, in denying to petitioner admission to examination for certificate of physician and surgeon of said state.

The Board of Medical Examiners[1] of said state, herein called the board, is a duly created body politic and corporate of said state and duly empowered to admit petitioner and persons similarly situated to examination for such certificate of physician and surgeon.

Respondent is a duly organized court of said state and, subject to discretionary review by the Supreme Court of said state, a court of last resort within the legislative jurisdiction of said state. Its proposed judgment is entitled as above, therein numbered 1 Civil Number 21,492 (appended hereto as appendix one) which purports to respond to the proposed opinion of respondent court in said proceeding (appended hereto as appendix two) and reported as 229 Advance California Appellate Reports 169 and ..... California Reporter .....). The findings of the trial court of original jurisdiction in the review of the actions of the

[1]The proceeding below originated upon petitioner's application to the board, wherein petitioner was identified as respondent. In the several reviewing courts, the board is identified as respondent and petitioner as petitioner and appellant.

board[2] are set forth in appendix three hereto. No opinion in support of its judgment was rendered. Petitioner duly petitioned for review of the proposed decision of respondent court by petition for hearing by the Supreme Court of said state, which petition was denied by the latter Court by its minute order (October 7, 1964, reported in pamphlet 21 of Volume 61 Advance California Reports, minutes, page 2) reading as follows:

> "1st Civ 21492, Div 1 Savelli v. Board of Medical Examiners. [229 A.C.A. 169.] Mosk, J., did not participate. Appellant's petition for hearing denied."

The proposed decision of respondent court is final in respect to the legislative jurisdiction of California and petitioner is without further remedy thereunder.

PART TWO: STATEMENT AS TO JURISDICTION.

Jurisdiction of this Court is invoked under the provisions of section 1257 of the United States Code.

Petitioner duly reserved all issues and questions related to his constitutional rights and privileges in his first pleading in the court of original jurisdiction[3].

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[2]Section 1094.5 of the Code of Civil Procedure of the State of California. Unless otherwise indicated references to statutes herein are to those of the latter state and emphasis, insertions and omissions in quotations herein are supplied by counsel.

[3]See Clerk's transcript on appeal in the record of respondent court at page 11, line 7, through page 12, line 21. The latter record (certified copy filed herein in support of this petition) consists of two transcripts of the proceedings in the trial court in one binding, but individually paginated, and identified as Clerk's transcript (herein CT) and Reporter's transcript (herein RT), respectively.

The ruling of respondent court on the effect of hearsay evidence could not be anticipated, specifically, but was duly reserved by petition for rehearing therein and by petition for hearing by said Supreme Court.

PART THREE: STATEMENT OF THE CASE.

Petitioner is a licentiate of the board under a certificate of drugless practitioner duly issued by the board and is qualified by such certificate and subsequent practice and medical schooling to admission to examination for the certificate of physician and surgeon, also issued by the board, as provided by legislation of said state particularly providing for such qualification and simultaneously abolishing future licensure of drugless practitioners in the state (statutes of 1949, chapter 233, sections 2191.6 and 2290 of the Business and Professions Code).

In the administrative hearing before the board petitioner offered evidence in support of his entitlement to admission to such examination, which evidence was not contradicted. The board received, as purported evidence, a copy of its findings in another proceeding before it to which petitioner was not a party. Such findings are conceded hearsay under California common law and statute. The board does not possess legislative power to render adjudications *in rem*.

The trial court, as the original court of review of the board's actions, is not empowered to receive evidence not introduced before the board (section 1094.5 of the Code of Civil Procedure).

It is adjudicated that, in the fifteen years since adoption of the 1949 legislation, the board has not admitted to the examination contemplated therein a single candidate, although another licensing board[4] of the state operating under the identical statute has functioned under it and has examined such candidates and issued such certificates to those successful in such examination. It is further adjudicated that the board's administrative regulations have at all times proscribed admission of petitioner and others similarly situated to schools approved by it and have withheld approval of schools admitting or offering to admit petitioner and others similarly situated (appendix three, pp. xxvii-xxviii).

The proposed decision would approve exclusion of petitioner from the examination specially provided for him and others similarly situated, in disregard of ample and uncontradicted evidence of his qualifications and entitlement to such examination, in reliance upon hearsay evidence proscribed by common law and state statute in enforcement of the board's discriminatory and *ultra vires* administrative regulation. Petitioner has exhausted every remedy provided by the laws of the state for the protection of his constitutional right to due process of law and equal protection of the laws of the state.

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[4]The Board of Osteopathic Examiners licenses licentiates qualified by training in osteopathy. By reason of subsequently enacted legislation, the licensing functions of the latter board have been merged with those of the board and osteopathic physicians are now licentiates of the board.

PART FOUR: STATEMENT OF GROUNDS FOR REVIEW AND SUPPORTING PRINCIPLE AND PRECEDENT.

The adjudicated and uncontradicted facts of this proceeding present for resolution the following questions of law, namely:

> I. May a state court constitutionally deprive a litigant of a declared statutory right exclusively in reliance upon purported evidence proscribed by state statute in such cases?

and

> II. May a state court constitutionally approve state administrative action denying exercise of a declared statutory right in violation of a state statute expressly conferring such right and defining the conditions to the exercise of such right?

I. PETITIONER IS PROPOSED TO BE DEPRIVED OF DUE PROCESS OF LAW AND OF EQUAL PROTECTION OF THE LAWS BY THE RENDITION OF THE PROPOSED OPINION UPON HEARSAY EVIDENCE IN VIOLATION OF CALIFORNIA STATUTE.

The proposed decision concedes petitioner's right to a determination of his entitlement to the examination he seeks (appendix two, pp. xviii-xx), but seeks to sustain the denial of this right exclusively by reference to conceded hearsay. The pretended exculpation for this proposed ruling is that petitioner did not object to such hearsay, in disregard to California statute which has eliminated the efficacy and necessity of such objection and, further, specifically proscribes a finding or adjudication supported exclusively by hearsay "evidence". The statutory rule is also the declared common law of California *(Walker v. City of San*

Gabriel, 20 C2d 879, 881, 129 P2d 349, 142 ALR 1383) and has heretofore been applied to actions of the board *(Rinaldo v. Board of Medical Examiners* (1928), 93 CA 72, 268 P 1076 and *Sunseri v. Board of Medical Examiners* (1964), 224 ACA 413, ... Cal. Rptr. .....).

The California statute (Section 11513 of the Government Code, quoted appendix two, pp. xix-xx) particularly provides that—

> *"Hearsay may be used . . . but shall not be sufficient* in itself to support a finding unless it would be admissible over objection in civil actions".

The integrated rule of decision in the state[5] is that hearsay in such proceedings may not be the subject of an objection—but that an adjudication cannot be constitutionally supported by such hearsay.

See the analysis and summary of state decisions in 15 Hastings Law Journal 369, 372, in part:

> "This express language of section 11513(c) *creates a limitation in administrative proceedings not found in civil actions.* In a civil action if admissible hearsay is not objected to it can of itself support a finding, while in administrative proceedings hearsay is limited to supplementing direct evidence, and *no right is given to object on the sole ground that the evidence is hearsay."*

See, also, idem, at 269-270 and 267-268.

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[5]See *Benedetti v. Department of Alcoholic Beverage Control,* 187 CA2d 213, 9 Cal.Rptr. 525, and *Sunseri v. Board of Medical Examiners,* supra, 224 ACA 413, ... Cal.Rptr. .....

It is thus clear that the proposed decision of respondent court would deprive petitioner of due process of law and equal protection of the laws in declining to apply rules of evidence duly declared by common law and express statutory limitation. As proposed, petitioner has been deprived by statute of the right to object to hearsay evidence necessary to the proposed ruling and is to be held to an adverse and discriminatory judgment based exclusively upon his asserted failure to interpose inadmissible objection to such hearsay evidence.

It is a well established principle of construction of the Fourteenth Article of Amendment that the several states may not discriminate among litigants in their courts in the application of rules of evidence.

See the leading case of

Oyama v. State of California, 332 US 633, 640, 644, 92 L ed 249, 256, 258, 68 S Ct 269.

It is immaterial to a holding of violation of these constitutional limitations that the legislation could be constitutionally applied, when it is adjudicated that such legislation has been applied in a discriminatory manner.

See

Yick Wo v. Hopkins, 118 US 356, 30 L ed 220, 6 S Ct 1064,

invalidating such discriminatory application of the laws of the state. In regard to such uncontrolled, discriminatory application of the state statute (section 11513 of the Government Code) note the contrary

holdings of state courts of equal jurisdiction with respondent court in the cases of *Sunseri v. Board of Medical Examiners* (supra, 224 ACA 413) and *Benedetti v. Department of Alcoholic Beverage Control* (supra, 187 CA2d 213).

There inheres in the discriminatory ruling proposed below the further vice that the proposed decision would rest upon details of record and evidence in a proceeding, not *in rem* and to which petitioner was not a party, itself a violation of these constitutional limitations.

See the rulings of this Court in

Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 301 US 292, 304-306, 81 L ed 1093, 1101-1102, 58 S Ct 77;

in relevant part:

"... This is not the fair hearing essential to due process. It is condemnation without trial.

"An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. ..."

Compare

Konigsberg v. State Bar of California, 353 US 252, 1 L ed 2d 810, 319, 77 S Ct 1374.

The decisions of the state are to the same effect.

Communist Party of U S of America v. Peek, 20 C2d 536, 546, 127 P2d 889;

Love v. Wolf, 226 ACA 482, 38 Cal.Rptr. 183;

Mack v. State Board of Education, 224 ACA 516, 36 Cal.Rptr. 677.

It is irrelevant that such discriminatory rulings apply to procedural and substantive rights related to professional licensure subject to the police power of the state.

Konigsberg v. State Bar of California (supra, 353 US 252, 1 L ed 2d 810, 819, 77 S Ct 1374).

It is respectfully submitted that the unconstitutional application of rules of evidence to deprive petitioner of an express statutory right, proved without contradiction, and to a lawful adjudication upon the lawful record in the cause invokes the discretion and justifies the review of this Court in the protection of petitioner from the effects of official nullification of law adopted in the public interest and made expressly applicable to petitioner and other persons similarly situated. In this regard, please recall that, in a period of fifteen years, no single candidate for examination of petitioner's classification has been admitted to examination by the licensing body of the state.

II. THE PROPOSED DECISION WOULD AFFIRM STATE ADMINISTRATIVE ACTION EXCLUDING PETITIONER FROM EXAMINATION TO WHICH HE AND OTHERS SIMILARLY SITUATED ARE ENTITLED AS PROVIDED BY STATE STATUTE.

The opinion proposed below would fructify official action of the board effectively excluding an entire statutory classification of candidates for examination for certificate of physician and surgeon from examination consistently throughout the period of fifteen years since the enactment of the qualifying and enabling legislation of the state.

Such exclusion has been accomplished by the refusal of the board to approve any school of medical training which will admit petitioner or persons similarly situated and prohibition of admission of petitioner and persons similarly situated by any such school enjoying the existing approval of the board[6].

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[6]The administrative regulations of the board (16 California Administrative Code 1359) since enactment of the 1949 legislation have provided as follows:

> "A student shall not be accepted for advanced standing upon credits received or work taken in any except an approved school."

Section 1366 provides that institutions approved for instruction in drugless practice are "None".

At the time of the adoption of the 1949 legislation the board's rules (16 California Administrative Code 1364) provided as follows:

> ". . . (e) In addition to the statutory provisions regarding preliminary and premedical education . . . and the rules hereinbefore mentioned covering same, the equipment, teaching facilities, etc., of a drugless practitioner school shall fulfill the requirements of the first and second years, detailed in the Schedule of Minimum Requirements, Administration, Supervision and Equipment, required for approval of medical schools."

In the instant proceeding before the board it further discriminated against this petitioner by finding against all admissible evidence of petitioner's qualification. The fact of discrimination is demonstrated by the lawful invocation of the same method of qualification by the Board of Osteopathic Examiners functioning under the same legislation of the state (appendix two pp. xxvi-xxvii).

Such discriminatory exclusion from examination of petitioner and persons similarly situated constitutes a classic violation of the principles declared and enforced in the leading case of *Yick Wo v. Hopkins* (supra, 118 US 356, 373, 374, 30 L ed 220, 227, 229, 6 S Ct 1064).

These principles have been similarly declared and enforced by the high Court of the State in the following cases:

Blumenthal v. Board of Medical Examiners, 57 C2d 228, 18 Cal.Rptr. 501, 368 P2d 101;

Duskin v. State Board of Dry Cleaners, 58 C 2d 155, 23 Cal.Rptr. 404, 373 P2d 468;

State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 C2d 426, 254 P2d 29;

Accounting Corporation of America v. State Board of Accountancy, 34 C2d 186, 208 P2d 984.

Secondly, the decision proposed below would deprive petitioner of the statutory right to a determination of his entitlement to admission to the examination he seeks as provided by section 2174 of the Business and Professions Code, namely:

> "§ 2174. . . . *If* any school is disapproved by the board or *any applicant for examination is rejected* by it, then the school or *the applicant may commence an action* in the superior court against the board *to compel it* to approve the school or *to admit the applicant to examination* or for any other appropriate relief. . . ."

The latter provision has been applied and enforced by the high court of the state in the case of

Mann v. Board of Medical Examiners, 31 C2d 30, 187 P2d 1,

in which an indistinguishable trial court judgment was reversed with directions to try the issues—

> ". . . whether the school . . . *should or should not be approved as of 1936, the year of petitioner's graduation.* . . ."
>
> * * *
>
> ". . . If, after a full hearing under section 2174, *the court should adjudge the school approved as of . . . the year of petitioner's graduation* then further proceedings before the board there would remain for it to determine only the issue of petitioner's good moral character. § 2168.
>
> "The judgment is reversed and the trial court is directed to entertain further proceedings in accordance with the views herein expressed." (p 42.)

The reviewing court of the state, in the case of

Lay v. State Board of Osteopathic Examiners, 179 CA2d 356, 357, 359, 3 Cal.Rptr. 727,

specifically enforced that candidate's entitlement to admission to such examination—though it was also

adjudicated that her school of training had not been approved.

Compare the New York decision in

People v. Bellfield, 210 NYS 450;

and the Florida case of

Eslin v. Collins, 108 Southern (2d) 889.

The rule of decision for review by this Court of state action depriving a litigant of a hearing upon the facts is declared in the recent cases of

Slochower v. Board of Higher Education of The City of New York, 350 US 551, 557, 100 L ed 692, 698, 76 S Ct 637;

Schware v. Board of Bar Examiners of the State of New Mexico, 353 US 232, 1 L ed2d 796, 801, 806, 77 S Ct 752,

and

Takahashi v. Fish and Game Commission, 334 US 410, 92 L ed 1478, 68 S Ct 1138.

In

England v. Louisiana State Board of Medical Examiners, 375 US 411, 413-415, 11 L ed2d 441, 444-445, 84 S Ct 461,

it was declared, in relevant part, as follows:

> "Appellants thereupon brought proceedings in the Louisiana courts. They did not restrict those proceedings to the question whether the Medical Practice Act applied to chiropractors. They unreservedly submitted for decision, and briefed and argued, their contention that the Act, if ap-

plicable to chiropractors, violated the Fourteenth Amendment. The state proceedings terminated with a decision by the Louisiana Supreme Court declining to review an intermediate appellate court's holding both that the Medical Practice Act applied to chiropractors and that, as so applied, it did not violate the Fourteenth Amendment, 126 So2d 51.

* * *

". . . *We reverse and remand to the District Court for decision on the merits of appellants' Fourteenth Amendment claims.*

* * *

". . . 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' Willcox v. Consolidated Gas Co., 212 US 19, 40, 53 L ed 382, 394, 29 S Ct 192, 48 LRA NS 1134.

* * *

"It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court."

* * *

It is respectfully submitted that the systematic exclusion of petitioner and others similarly situated from the admission procedure provided by state statutes to acquire the lawful opportunity to earn a livelihood denies to petitioner due process of law and equal protection of the laws which should be corrected by

the judgment of this Court and this petition should be granted to this end.

Dated, San Francisco, California,
January 6, 1965.

Respectfully submitted,
HUTCHINSON & QUATTRIN,
By J. ALBERT HUTCHINSON,
Attorneys for Petitioner.

(Appendix Follows)

Appendix One

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 21,492

San Francisco, August 13, 1964

Richard F. Savelli,
Plaintiff and Appellant,
vs.
Board of Medical Examiners of the State of California,
Defendant and Respondent.

On Appeal from the Superior Court in and for the City and County of San Francisco
Superior Court No. 523268

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Molinari, J.

We concur:
Bray, P. J.
Sullivan, J.

Whereupon, it is ordered, adjudged and decreed by the Court that the judgment of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby Affirmed.

Respondent to recover costs on appeal.

I, Lawrence R. Elkington, Clerk of the District Court of Appeal of the State of California, in and for the First Appellate District, do hereby certify that the foregoing is a true and correct copy of an original judgment entered in the above entitled cause on the 13th day of August, 1964, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 13th day of October, A.D. 1964.

(Seal) Lawrence R. Elkington, Clerk

I, Lawrence R. Elkington, Clerk of the District Court of Appeal, State of California, in and for the First Appellate District, do hereby certify that the preceding and annexed is a true and correct copy of a remittitur issued on October 13, 1964 as shown by the records of my office.

Witness my hand and the seal of the Court, this 11th day of December, A.D. 1964.

(Seal) Lawrence R. Elkington, Clerk.

Appendix Two

(229 A.C.A. 169.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 21,402

Richard F. Savelli,
Plaintiff and Appellant,
vs.
Board of Medical Examiners of the State of California,
Defendant and Respondent.

OPINION

This is an appeal from a judgment denying a writ of mandate to compel respondent to permit appellant to take the written examination for a license as a physician and surgeon.

Appellant filed an application with respondent for a written examination for a physician's and surgeon's certificate. The application was denied on the ground that appellant was not a graduate of a medical school approved by respondent. Appellant thereupon re-

quested a hearing before respondent, and a hearing was had before a hearing officer on a statement of issues filed pursuant to the Administrative Procedure Act[1] (Gov. Code, §§ 11370 to 11528, incl.). Appellant was the sole witness at this hearing, and testified as follows: that he was then a licensed drugless practitioner; that he was licensed as a pharmacist in 1928 and practiced as such until 1935 when he enrolled at a college for drugless practitioners; that he was trained in an approved course of instruction totalling 3,234 hours, and was examined and licensed in 1939 as a drugless practitioner; that he then entered the practice of the profession of drugless practitioner; that in 1951, pursuant to a legislative enactment in 1949 which allowed a drugless practitioner who had 5 years or more of experience to go back to school and complete the necessary courses required for a physician's and surgeon's certificate in a recognized school, he enrolled at Western College of Medicine[2] (hereinafter called Western), where he took the courses speci-

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[1]Gov. Code § 11504, in pertinent part, provides as follows: "A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing. . . ."

Gov. Code § 11500, subd. (c), provides, in pertinent part: "'Respondent' means any person . . . against whom a statement of issues is filed pursuant to Section 11504."

[2]Said school was referred to in the testimony as "Western Medical" and "Western College" and designated in some of the exhibits as "Western Medical College" and "Western College of Medicine." It appears from the record that the last-mentioned name is most likely correct. In any event, the parties do not dispute that the school mentioned is the one which is the subject of these proceedings.

fied in section 2290 of the Business and Professions Code;[3] that these courses were given by this school only once; that the teachers who taught these courses were licensed doctors of medicine and qualified to teach the subjects; that he completed the course and received from said school the degree of Doctor of Medicine; that prior to the time he entered Western he had made application to both the University of California Medical School and Stanford Medical School, but was not accepted as a student; that he served an internship from July 1, 1959 to October 16, 1959 at Our Lady of Lourdes Memorial Hospital in Binghamton, New York, and at Mount St. Mary's Hospital in Niagara Falls, New York, from October 19, 1959 to October 18, 1960; and that the latter hospital was approved by the "Board of the Medical Association."

Respondent elected not to cross-examine appellant. It did, however, offer in evidence 9 exhibits which were admitted in evidence without objection. Aside from the pleadings incident to the hearing these consisted of appellant's application and respondent's aforementioned letter of rejection, a previous application filed in 1952; the letter rejecting said application, and the decision of respondent board in the proceeding entitled "In the Matter of the Statement of Issues against Western College of Medicine, Respondent, No. A-44," (hereinafter referred to as exhibit 9). Re-

[3]These courses are: Biochemistry, advanced bacteriology and pathology, surgery, materia medica, pharmacology and therapeutics, general medicine, including clinical microscopy, advanced obstetrics and gynecology.

spondent thereafter made and filed its decision denying appellant's application on the ground that he was not able to present satisfactory evidence that he had complied with the requirements of section 2290 of the Business and Professions Code[4] of the State of California.[5]

Appellant sought a judicial review of the administrative proceedings by filing a petition for writ of mandate in the superior court. By said petition appellant sought a review of respondent's order denying his application to take the subject written examination and prayed for an order directing respondent to recognize or approve Western. As an alternative in the event the court determined that he was not entitled to the writ of mandate, appellant sought a declaratory judgment determining and declaring certain sections of the Business and Professions Code unconstitutional and void as applied to himself and persons similarly situated.[6] The basis of the claim of unconstitutionality is that said statutory provisions are capable of being applied, and have applied with respect to appellant and persons similarly situated, in

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[4]Unless otherwise indicated, all statute references hereinafter made are to the Business and Professions Code.

[5]§ 2290 in pertinent part provides: "Any person, who holds a drugless practitioner's certificate, . . . and who presents evidence of having successfully completed the additional courses required for the physician's and surgeon's certificate in a school approved by the board, shall be permitted to take his examination in subjects required for a physician's and surgeon's certificate without being re-examined in the subjects required for a drugless practitioner's certificate. The subjects for this examination shall be: . . ."

[6]The specific sections are the following: 2010, 2012, 2119, 2168, 2168.5, 2171, 2173, 2190, 2191, 2191.6, 2192, 2195, 2290 and 2291.

a "discriminatory, uncontrolled, capricious, unfair and prejudicial manner. . . ." An alternative writ of mandate issued out of the court below to which respondent made a return by way of motion to strike, demurrer and answer.[7] The trial court denied the peremptory writ, discharged the alternative writ, and determined, in view of such denial, that a declaratory judgment was unnecessary.

The trial court made and filed its findings of fact and conclusions of law. It was not, however, required to make findings of fact because it was not acting de novo, but was required to determine whether the findings of respondent board were supported by substantial evidence in the light of the whole record. Where the substantial evidence rule applies the trial judge does not independently weigh the evidence and make his own findings, but determines a question of law, i.e., whether the evidence is legally sufficient and like questions enumerated in Code of Civil Procedure section 1094.5. (Rudolph v. Athletic Commission, 177 Cal. App. 2d 1, 6-8.) The instant case is one brought pursuant to the provisions of section 2174, which, insofar as here material, provides as follows: "If any school is disapproved by the board or any applicant for examination is rejected by it, then the school or the applicant may commence an action in the superior court against the board to compel it to approve the school or to admit the applicant to examination. . . .

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[7]The disposition of the motion to strike and the demurrer does not appear in the record before us. It appears, however, that the cause proceeded to trial upon the issues of law and fact tendered by the said petition and the answer thereto.

In such an action the court shall proceed under Section 1094.5 of the Code of Civil Procedure; *provided, however, that the court may not exercise an independent judgment on the evidence.*"[8] (Emphasis added; see Mann v. Board of Medical Examiners, 31 Cal. 2d 30, 41-42; Akopiantz v. Board of Medical Examiners, 146 Cal. App. 2d 331, 336; Lay v. State Bd. of Osteopathic Examiners, 179 Cal. App. 2d 356, 359.) In the present case the findings of the trial judge are not only susceptible of the interpretation that he weighed the evidence, thus exceeding his prerogative, but it is so stated in the recitals of the judgment rendered by him.[9]

Section 2174 does not authorize a trial court to exercise its independent judgment on the evidence but confines the hearing before such court to the record made before the board. (Lay v. State Bd. of Osteopathic Examiners, supra, p. 359.) Its function, therefore, is to determine whether there is substantial evidence before the board to support its findings in the light of the whole record. (Le Strange v. City of Berkeley, 210 Cal. App. 2d 313, 320-321; Code Civ. Proc., § 1094.5, subd. c.) Accordingly, in the case at bench, the trial court should have reviewed the evidence adduced before respondent board and the findings made by it in the same fashion that an appellate court reviews the findings of trial courts. The function

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[8]This section was invoked by appellant in his petition for writ of mandate.

[9]The judgment contains the following recital: "[A]nd the Court being fully advised in the matter and having exercised its independent judgment and having made its Findings of Fact and Conclusions of Law, . . ."

of an appellate court is to determine whether the evidence, viewed in the light most favorable to the respondent, sustains the findings subject to review, resolving any reasonable doubts in favor of those findings. (Le Strange v. City of Berkeley, supra, p. 321.) In making this determination the appellate court must resolve all conflicts in the evidence in favor of the judgment or decision of the tribunal below and indulge in all legitimate and reasonable inferences to support it. (Harris v. Alcoholic Bev. Con. Appeals Bd., 212 Cal. App. 2d 106, 113; DeMartini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787, 799.) Insofar as the appellate court itself is concerned, the substantial evidence rule obtains whether it is reviewing the findings of the trial court where the latter has exercised independent judgment, or whether the findings involve the decision of an agency or board where the trial court is not authorized by law to exercise its independent judgment. In the former situation, the appellate court is confined to the evidence received by the trial court; in the latter case it is limited to the evidence in the record before such agency or board. (Le Strange v. City of Berkeley, supra, p. 321.)

The erroneous exercise of independent judgment by the trial court in the case at bench in no way inhibits our scope of review. (Harris v. Alcoholic Bev. Con. Appeals Bd., supra, p. 113; DeMartini v. Department of Alcoholic Beverage Control, supra, p. 798.) It should be here noted, however, that no additional evidence was proffered or adduced in the court below.

Therefore, the evidence considered by the trial court was the same as that weighed by respondent board. Accordingly, even if we were called upon to review the record before the trial court in the light of the substantial evidence rule we would be considering the same record as that before both respondent and the court below. Moreover, even though the trial court did weigh the evidence no prejudice is suffered by appellant if the result reached was necessarily an affirmance of the sufficiency of the evidence to support respondent's findings (Rudolph v. Athletic Commission, supra, 177 Cal. App. 2d 1, 8.)

Our review being confined to the record of the proceedings before respondent, we must look to its findings and decision.[10] Respondent board found that appellant had filed the two subject applications for a physician's and surgeon's certificate wherein he certified that he was a drugless practitioner for 5 years and that he attended Western from September 4, 1951 to July 5, 1952; that said applications were each denied on the basis that he did not show thereon that he had completed the additional courses required in section 2290 in a school approved by the board; and that in its decision effective February 28, 1957, respondent had denied Western's application for approval on the ground that Western failed to meet the requirements of section 2290. The decision in the instant proceedings states that "[p]ursuant to the foregoing findings of fact" the issues presented are

[10]Appellant's briefs attack the findings of the trial court rather than those of respondent board.

determined as follows: "Respondent [appellant] has not been able to present satisfactory evidence that he has complied with the requirements of Section 2290 . . . for entitlement to take the written examination for a physician's and surgeon's certificate (Class A) and therefore his application ought to be denied."

Before proceeding to a consideration of the contentions made by appellant, it would be well to state what he was required to show in the proceedings before respondent board. The burden was upon him to prove compliance with the requirements fixed by statute as conditions precedent to his right to take the subject examination. (Lay v. State Bd. of Osteopathic Examiners, supra, 179 Cal. App. 2d 356, 357; Mann v. Board of Medical Examiners, supra, 31 Cal. 2d 30, 40; Arwine v. Board of Med. Examiners, 151 Cal. 499, 503.) Accordingly, it was incumbent upon him to prove: (1) that he was licensed as a drugless practitioner for a period of 5 years or more; (2) that he had successfully completed the course of professional instruction in a school approved by respondent; and (3) that he has completed a year's internship in a hospital approved by respondent.[11] There was uncontradicted substantial evidence in the record supporting a finding that appellant complied with the first and third of said requirements. There is also ample uncon-

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[11]Rule 1342(b) of Title 16 of the Cal. Admin. Code designating the hospitals approved by respondent provides that hospitals located outside of the State of California that meet the standards of the American Medical Association Council on Medical Education and Hospitals are approved for the training of interns in accordance with section 2192.

tradicted evidence that appellant took the courses prescribed by section 2290 at Western. The board, however, made no specific findings of fact on these matters. Although administrative findings must conform to the statutes governing the particular board or agency, such findings are liberally construed and need not be stated with the formality required in judicial proceedings. (Swars v. Council of City of Vallejo, 33 Cal. 2d 867, 872; Taylor v. Bureau of Private Investigators, 128 Cal. App. 2d 219, 229; Steele v. L. A. County Civil Service Com., 166 Cal. App. 2d 129, 136.) Under Government Code section 11518,[12] providing for the form and content of the decision of the administrative agency, the findings must be sufficient to enable the reviewing court to determine that the agency actually found necessary facts to support its determination of the issues. (Jones v. Maloney, 106 Cal. App. 2d 80, 90-91.) Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review possible and apprising the parties of the basis of the decision of the administrative agency. (Swars v. Council of City of Vallejo, supra, p. 873.) Accordingly, where such findings point out the specific ground upon which the agency has based its decision such a finding will suffice even though the reviewing court might prefer a more detailed statement of the grounds for the de-

[12]Gov. Code § 11518 provides in pertinent part as follows: "The decision shall be in writing and shall contain findings of fact, a determination of the issues presented. . . . The findings may be stated in the language of the pleadings or by reference thereto."

cision. (Webster v. Board of Dental Examiners, etc., 17 Cal. 2d 534, 543-544.)

Respondent's decision rests upon the ground that appellant has not complied with the provisions of section 2290. This conclusion is based upon the finding that Western was not an approved school. Having determined the issue relative to appellant's attendance at an approved school adversely to him, respondent apparently found it unnecessary to make specific findings on the other issues. From the briefs of the parties it is apparent that the sole issue for determination with respect to appellant's qualifications is whether he attended a school approved by respondent. The parties apparently assume that appellant has established his qualifications in all other respects. Suffice it to say, in the light of principles hereinabove stated, a proper determination that Western was not an approved school would support the denial of appellant's application, and would make unnecessary a finding on the other issues. As we have already pointed out, it was appellant's burden to prove that he took the required courses at a school approved by the board.[13]

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[13]The following provisions are likewise indicative of the burden placed upon the applicant:

§ 2010: "Whenever any requirement is provided for any certificate, it shall be satisfied in a manner satisfactory to the board."

§ 2012: "Whenever any requirement is provided for any certificate relating to a school or hospital, the school and hospital shall be ones approved by the board."

§ 2168: "All applications . . . shall contain or have attached thereto: . . . (b) Each diploma issued by some legally chartered school approved by the board. The requirements of the school shall have been at the time of granting the diploma in no degree less than those required under this chapter or by any preceding medical practice act at the time that the diploma was granted. . . ."

At the hearing before respondent board appellant adduced evidence that he attended Western and took the courses prescribed in section 2290 from qualified instructors. Concededly, Western was never expressly approved by respondent board.[14] Appellant's theory is that there was an implied or de facto approval of the school by reason of the fact that it gave the courses prescribed in section 2290 and that these courses were given by qualified instructors. The pertinent section, applicable to approval of medical schools and the right to apply for the examination, is section 2173 which provides as follows: "The board shall approve every school which complies with the requirements of this chapter for resident courses of professional instruction and shall admit every applicant to the examination who complies with the requirements provided for the particular certificate for which his application is filed. Nothing in this chapter prohibits the board from considering the quality of the resident courses of professional instruction required." Section 2011 defines a resident course of instruction as follows: "[C]lassroom, laboratory, practi-

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§ 2168.5: "Every applicant shall prove that a diploma or other evidence of final, successful and entire completion of instruction and training required by a school approved by the board has been issued to him."

§ 2171: "All applicants for any certificate shall file evidence satisfactory to the board, showing each legally chartered school, approved by the board, in which a resident course of professional instruction was pursued covering the minimum requirements provided for the particular certificate for which the application is filed."

[14]Western College of Medicine is not found among the list of approved schools set forth in sections 1366 through 1367.10 of Title 16 of the Cal. Admin. Code.

cal and clinical instruction, received and given the person physically present for the period prescribed for such instruction." The resident courses required for a physician's and surgeon's certificate pursuant to section 2173 are those specified in sections 2191 and 2192.

Section 2191, requiring certain premedical educational requirements, is not applicable to drugless practitioners who have conducted a legally licensed practice for a period of 5 years or more and who have successfully completed the courses of professional instruction required by section 2290 "in a recognized school." (§ 2191.6.) It is convenient to note here that appellant contends that the language "courses of professional instruction required by section 2290 of this code in a recognized school" contained in section 2191.6, enacted in 1949, modifies and supersedes the language "in a school approved by the board" in section 2290, enacted in 1937. It is appellant's position that although Western may not be an approved school it is nevertheless a recognized school. Appellant fails to point out the distinction between a "recognized" and an "approved" school, and we are unable to perceive any. Suffice it to say, section 2191.6 is specifically referable by its provisions to section 2191 providing for premedical educational requirements, while section 2290 has application to the *additional medical* courses required of a drugless practitioner seeking a physician's and surgeon's certificate. There is no contention made by respondent, moreover, that appellant was required to present evidence to the board that

he had completed the educational requirements provided for in section 2191.

Section 2192 provides for the courses and curriculum of resident instruction generally required of physicians and surgeons. We are of the opinion, however, that this section does not apply to persons who hold a drugless practitioner's certificate who seek a physician's and surgeon's certificate pursuant to section 2290. We are impelled to this conclusion by the plain language of section 2290 which provides that the resident course of professional instruction required of such an applicant is that which was required of such a practitioner for the issuance of a drugless practitioner's certificate.[15] Section 2290 must, however, be read in conjunction with section 2191. Accordingly, a licensed drugless practitioner who has practiced less than 5 years must, before he is eligible to take the physician's and surgeon's examination, show not only that he has taken the additional courses prescribed by section 2290 at an approved school, but also that he has completed the premedical educational requirements specified in section 2191.[16] In the case of such a practitioner who has practiced more than 5 years, all that he need show, in order to be eligible for such examination, is that he has successfully

[15]The classification of drugless practitioner was abolished in 1949, but persons holding licenses as such practitioners may continue to engage in practice. (§ 2232.) Section 2231, as it read prior to its repeal in 1949, provided for the courses of resident professional instruction in a school approved by the board required of drugless practitioners.

[16]It should be noted that the resident course required by § 2191 need not have been completed at a school approved by the board.

completed the additional courses prescribed in section 2290 at an approved school. Upon an analysis of the pertinent code sections, particularly section 2290, we are persuaded that respondent board may approve a school which offers only the additional courses required of a drugless practitioner who seeks admission to a physician's and surgeon's examination under section 2290, but does not offer the complete course of resident professional instruction required of physicians and surgeons, i.e., that required by sections 2191 and 2192. (See 17 Ops. Atty. Gen. 197.) Accordingly, a school offering the additional resident courses prescribed by section 2290 is entitled under section 2173 to be approved by the board of medical examiners if it satisfactorily demonstrates to the board that it offers these courses; provided, however, that the board may consider the quality of the resident courses being offered in order to determine whether the school is one that should be approved. The right to have a school approved inures also to an applicant who seeks admission to the examination on the basis that the school he has attended complied with the requirements for resident courses of professional instruction during the time of such attendance. (§ 2174; Mann v. Board of Medical Examiners, supra, 31 Cal. 2d 30, 41-42; Lay v. State Bd. of Osteopathic Examiners, supra, 179 Cal. App. 2d 356, 358-359.)

In the case at bench appellant sought to take the examination and to establish that Western was an approved school upon evidence that he was a licensed drugless practitioner for over 5 years and that from

September 4, 1951 to July 5, 1952 he took the courses specified in section 2290 at Western. Respondent, on the other hand, introduced evidence by way of exhibit 9 to prove that Western was not an approved school when appellant took said courses. According to exhibit 9 Western filed an application for approval on May 17, 1950; hearings were had on said application; and a decision was made on January 24, 1957, effective February 28, 1957, disapproving said application on the ground that Western failed to meet the requirements of section 2290. Exhibit 9 contains a recital of the findings of fact upon which the disapproval was based. It is apparent from a reading of these findings, which we set out in the footnote,[17] that evidence wa.

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[17]The decision reads in pertinent part as follows:

"With respect to the matters contained in paragraph III of the Statement of Issues on file herein, the following facts are found to be true:

"1. Said school did not offer the required courses, the facilities, nor the quality of instruction necessary to properly prepare a drugless practitioner licentiate to take the physician's and surgeon's examination.

"2. The laboratory of the school was too small for the number of students and did not have the equipment necessary for complete instruction and study.

"3. The ratio of actual teaching faculty to students was inadequate, and there was a duplication of instructors. The caliber of teaching was poor and would not equip the student with sufficient medical knowledge to prepare the student for examination.

"4. There were no hospital or ward facilities available for teaching purposes.

"5. There was no adequate x-ray equipment available for teaching purposes, and the lack of clinical material made it impossible for all the required subjects outlined in the curriculum to be taught.

"6. The schedules and courses of the curriculum as outlined in the affidavit furnished to the Board by the school were not followed and some of the scheduled courses were not actually offered or held.

"7. The hours given for classroom instruction were too demanding and did not give the student sufficient time to study and

adduced before the board as to the quality of the resident courses of professional instruction. Pursuant to section 2173 the quality of such courses is a proper matter for the board's consideration in determining whether a school is entitled to approval. The facts contained in exhibit 9, which the board found to be true with respect to Western's application for approval, were also before it in the instant proceeding relative to appellant's application for approval. These facts, when considered within the scope of our review, constitute substantial evidence to support the conclusion reached by respondent that Western did not meet the requirements of section 2290. Accordingly, appellant failed to sustain the burden resting upon him to prove compliance with the requirements fixed by statute as a condition precedent to the taking of the subject examination.

Appellant complains that exhibit 9 was hearsay and that, as a result of its admission, the decision of respondent cannot be sustained because it is "exclusively" based on hearsay evidence. He relies upon Government Code section 11513, applicable to administrative proceedings, which provides in pertinent part that "Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection

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review the material and information offered and did not permit him to assimilate the same.

"8. The clinic was poorly equipped and was not actually in operation either as claimed by the school in the affidavit which it furnished to the Board or on the date of March 8, 1952, when the school was inspected by the members of the Board."

in civil actions." Assuming that exhibit 9 constitutes objectionable hearsay, it is nevertheless of probative value because it was unobjected to when offered. (Fox v. S. F. Unified School Dist., 111 Cal. App. 2d 885, 891; Griswold v. Dept. Alcoholic Bev. Control, 141 Cal. App. 2d 807, 810-811; see Steen v. Board of Civil Service Commrs., 26 Cal. 2d 716, 726-727.) Accordingly, hearsay, admitted without objection, may be considered in support of a finding. (Griswold v. Dept. of Alcoholic Bev. Control, supra, p. 811; Merchant etc. Assn. v. Kellogg E. & D. Co., 28 Cal. 2d 594, 599.) As stated in *Fox*, "[h]earsay, even at common law, if unobjected to when offered, can be of probative value, and certainly occupies a similar position in an administrative proceeding such as this." (P. 891.)

The conclusion reached by us is consistent with the holdings of the *Mann* and *Lay* cases upon which appellant strongly relies. *Mann* held, in a proceeding to compel the issuance of a reciprocity certificate, that petitioner, a graduate of an out of state school, had failed to sustain his burden of proving that his school had been approved. The important holding in *Mann* is that under section 2174 the applicant himself may seek to have the school attended by him approved by the board as of the time when he had attended it. It should also be noted that at the time of the *Mann* decision the evidence presented in an action pursuant to section 2174 was as in a trial de novo.[18] The *Lay* case,

[18] § 2174 then provided that the superior court had "full power to investigate and decide all facts anew without regard to any previous determination by the board; . . ."

following the principles laid down in *Mann*, held that upon the record made before the board, in a proceeding brought pursuant to section 2174 as it now reads, the applicant's school had been entitled to approval during the time of her matriculation. The reviewing court there upheld the superior court's determination that the respondent board had prejudicially abused its discretion in finding that the school, during the time the applicant had attended it, had not been approved, "*without anything more. . . .*" (P. 359; emphasis added.)

Although appellant alleged in his petition that his constitutional rights have been violated, no denial of any constitutional right or discriminatory action against him is shown. Appellant contends that the "approval" power of the board is void because nowhere does the code define or delineate any standard or criterion of determining approval or disapproval. The use of the words "approved" and "approval" appear not only in the provisions of the Business and Professions Code relating to the subject of medicine (§§ 2012, 2168, subd. (b), 2168.5, 2171, 2173 and 2192), but also in provisions dealing with other occupations licensed by this state.[19] The state has the plenary

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[19]See sections: 5552, subd. (b) (Architects); 6060, subd. (c)(1) (Attorneys); 6546.5 (Barbers); 7332, subd. (d)(1) (Cosmetologists); 1740(c) (Dental Hygienists); 7643, subd. (d) and (e) (Embalmers); 6751 (Engineers); 5650 (Landscape Architects); 2736(a) (Nurses); 2491 (Osteopaths); 2680, subd. (a) and (c) (Physical Therapists); 2246 (Podiatrists); 4511, subd. (c) (Psychiatric Technicians); 2941(4) and 2941.5 (Psychologists); 9002 (Social Work Examiners); 8742, subd. (b) (Surveyors); 2866, subd. (c) (Vocational Nurses).

power to regulate the practice of medicine. (Mann v. Board of Medical Examiners, supra, p. 41; Akopiantz v. Board of Medical Examiners, 190 Cal. App. 2d 81, 92.) In *Mann* the Supreme Court took cognizance of this plenary power, citing the number of statutory provisions of the Business and Professions Code dealing with the subject of medicine. Among these is section 2010 which provides: "Whenever any requirement is provided for any certificate, it shall be satisfied in a manner satisfactory to the board." In *Akopiantz* the reviewing court was called upon to pass upon the question whether certain schools of medicine were approved schools in a reciprocity case. Statutes involving approval by respondent board were there under consideration, including section 2168.5, which applies to the present case. The requirement of the affirmative approval of schools in order to qualify their graduates for licensure in California was upheld. The court discussed, and, by necessary implication, held valid sections of the Business and Professions Code which used the word "approved" in referring to the recognition of a school or schools attended by an applicant. Although it is the general rule that a legislative body cannot, with respect to the standards for administrative action, confer unlimited power upon an officer without designating standards to guide his action, there are limitations to this rule. The granting of discretionary power, not restricted by specific standards, to confer or deny licenses or permits has been upheld in a variety of situations, particularly where the licensed activity is dangerous or objection-

able. (In re Petersen, 51 Cal. 2d 177, 184.) Moreover, "[i]t is settled . . . that the Legislature need not lay down minutely defined standards and that sufficient standards for administrative action may be found by implication from the general purposes of a statute and from the reasons which must have led to its adoption." (Louis Stores, Inc. v. Department of Alcoholic Beverage Control, 57 Cal. 2d 749, 760; In re Petersen, supra, p. 186.) We think it is obvious that the limitations on the general rule are applicable to the practice of medicine and its relationship to the public health and welfare. The absence of express standards in situations where the limitations on the general rule are applicable does not mean that the licensing agency may act arbitrarily or oppressively; and while it is presumed that the agency will duly perform its public duty, an abuse may be shown and relief obtained in the courts. (In re Petersen, supra, p. 185.) In the case at bench, no arbitrary or oppressive action on the part of respondent to appellant's detriment has been shown. To the contrary, the record discloses the several standards utilized by respondent in determining that the quality of the instruction offered by Western was not such as to meet the statutory requirements. The intimation in appellant's briefs that respondent has discriminated against him by failing to approve any school offering the courses specified in section 2290 is without foundation. There is nothing in the record before respondent board to show that any other school which has applied for approval has been disapproved. The only showing made is that

Western has so applied and that it has been disapproved. It should be noted that in Title 16, California Administrative Code, section 1366, four California schools are designated as approved. Appellant applied for admission to two of them but was not accepted. Section 1366 also designates a substantial number of out of state schools as approved.

Appellant contends that he was entitled, in all events, to a declaratory judgment. Respondent urges that an action for declaratory relief is not appropriate for review of an administrative order. Since this action proceeds under Code of Civil Procedure section 1094.5 by virtue of the provisions of section 2174, mandamus is appropriate for the purpose of reviewing respondent's administrative order. (Boren v. State Personnel Board, 37 Cal. 2d 634, 637.) While an action for declaratory relief is not appropriate for review of an administrative order (Hostetter v. Alderson, 38 Cal. 2d 499, 500), the complaint in such an action may be regarded as a petition for writ of mandate. (Boren v. State Personnel Board, supra, p. 637.) Although section 2174 provides that an action thereunder may seek "any other appropriate relief," we are of the opinion, in view of the requirement that the action proceed as one under Code of Civil Procedure section 1094.5, that such language envisions the relief that may be granted in a mandamus proceeding. We need not, however, determine whether the subject statutory language encompasses matters subject to a declaration of rights under Code of Civil Procedure section 1060 because our disposition of

appellant's prayer for relief likewise disposes of the matters concerning which he seeks a declaration of rights.

Judgment affirmed.

Molinari, J.

We concur:

Bray, P. J.

Sullivan, J.

Filed August 13, 1964,
Lawrence R. Elkington, Clerk.

Appendix Three

ABSTRACT OF FINDINGS OF FACT OF SUPERIOR COURT

"The decision of respondent in said proceeding is based upon the evidence set forth in the transcript of respondent's hearing and Exhibits 1 through 9 received in evidence before respondent in its proceeding; that petitioner was not a party to the proceeding identified . . . by respondent's Exhibit 9, referring to . . . Western College of Medicine, . . .

"Respondent has not at any time since the enactment of Section 2191.6 of said code designated or accepted any medical school as recognized for the purpose of Section 2191.6 of said code, or otherwise; that respondent has not at any of said times approved any school for the purpose of providing instruction in the courses of medicine defined and described in Section 2290 of said code, as to be taken by licensed drugless practitioners, or otherwise; that respondent has not admitted or accepted for examination for certificate of physician or surgeon any licensed drugless practitioner upon his licensure as a drugless practitioner and the taking of the courses defined in Section 2290 of said code in any circumstances, or at all; that the Board of Osteopathic Examiners of said state had admitted to examination one, or more, of its licensed drugless practitioners licensed by said latter board upon such licensure as drugless practictioner and the taking of the courses defined in Section 2290 of said code in . . . a school separately teaching only said

courses . . . not separately or independently approved for the purpose of giving said course by said Board of Osteopathic Examiners of the State of California, or by respondent; that said courses . . . did not include clinical demonstration, dissection of human cadavers or animal experimentation and encompassed one thousand hours of such instruction within ten months or less; that none of said courses was accomplished in any class or course otherwise conducted in or by said school or in conjunction with the instruction therein of persons other than such persons licensed by said Board of Osteopathic Examiners as other than physicians and surgeons; . . .

"(d) No school approved by respondent has been shown to have at any of said times admitted, offered to admit, and none would admit at the time of petitioner's said application to respondent, a licensed drugless practitioner to advanced standing therein for the purpose of taking training in the courses specified . . . , which facts in this subparagraph (d) of Paragraph IV were and have been known to respondent at said times by actual knowledge or by constructive and official notice.

"(e) Petitioner has at all times subsequent to the effective date of Section 2191.6, and prior to the filing of his said application with respondent, attempted by all means available to him, as reflected in the record before respondent, to secure admission to medical schools conducted and maintained at said times within the State of California and approved by respondent.

"V

"That it is true that petitioner has alleged his assertions . . . and it is true that respondent denies the allegations, assertions and contentions of petitioner therein set forth; . . .

". . . at all material times respondent had adopted and maintained those certain rules 1359 and 1366 . . .

" '1359. Advanced Standing in Approved Schools. (a) A student shall not be accepted for advanced standing upon credits received or work taken in any except an approved school.' "

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FILED
FEB 8 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 821

RICHARD F. SAVELLI,
Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the District Court of Appeal, First Appellate District, State of California

Brief for Respondent in Opposition

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OPINIONS BELOW

The opinion of the District Court of Appeal, State of California (First Appellate District, Division One) is reported in 229 A.C.A. 169, 40 Cal. Rptr. 171 (1964).

JURISDICTION

Petitioner attempts to invoke the jurisdiction of the Court by a general reference to 28 U.S.C. section 1257 (Pet. Cert. - 3), but he does not identify which of the specific bases of jurisdiction, as set forth in the various sub-sections, is re-

lied upon.[1] Section 1257(3) could be considered appropriate inasmuch as it grants jurisdiction where "any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

However, the Petition shows on its face that it is not timely and that this Court is without jurisdiction to review the decision below. The Petition correctly states (Pet. Cert. -3) that the Supreme Court of the State of California denied a Petition for Hearing on October 7, 1964. After such a denial, the decision is final. The 90-day period allowed for filing a Petition for a Writ of Certiorari (28 U.S.C. § 2101(c) and Rule 22) expired on January 5, 1965 and the instant petition was not filed with the Clerk of this Court until January 9, 1965. Respondent is informed that no application under Rules 22(4) and 34 for an extension of time within which to file for certiorari was filed and, therefore, this Court is without jurisdiction to review the decision below.

QUESTIONS PRESENTED

Neither of the questions presented by Petitioner need be reviewed by this Court because the decision below rests upon perfectly adequate and independent state grounds.

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1. The Petition for Certiorari was prepared in complete disregard of Rules 19 and 23 of this Court. Among the more egregious departures from the established procedure on certiorari is the complete failure to demonstrate "the stage in the proceedings . . . and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court . . . ." Rule 23(1), subparagraph (f). The petitioner does assert that he "reserved all issues and questions related to his constitutional rights and privileges . . ." (Pet. Cert. -3) and makes a reference to the transcript where these matters may be found. However, he leaves it to the Court or respondent to determine whether they are the same contentions now raised and whether the assertions are sufficient to confer jurisdiction upon this Court. In addition, the admonition of Rule 19 that "special and important reasons" must be shown for the granting of this dis-

STATUTES INVOLVED

The principal statutes concerned herein are adequately set forth in the opinion of the District Court of Appeal and the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE AND ARGUMENT

Petitioner, a drugless practitioner, complains that he was denied a request to take an examination for the certificate of physician and surgeon. As pointed out by the District Court of Appeal, in order to take this examination, "it was appellant's burden to prove that he took the required courses at a school approved by the board." (Op. - xiii)[2] After a review of the evidence, the court held:

> "Accordingly, appellant failed to sustain the burden resting upon him to prove compliance wtih the requirements fixed by statute as a condition precedent to the taking of the subject examination." (Op. - xix.)

Certainly, it is purely a matter of state law and presents no reviewable federal question for a California court to rule that petitioner did not sustain his burden of proof. Here it is clear that he did not demonstrate that he had complied with the statutory requirements for taking a physician and surgeon's examination. No claim is made that the requirements themselves offend the Constitution of the United States.

In addition, the reviewing court took judicial notice of sections 1366 through 1367.10 of Title 16, California Administrative Code, which sets forth the list of schools approved by the Board of Medical Examiners. The court noted that

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cretionary writ has been ignored. An examination of the Petition and opinion shows, however, neither special, important nor constituitional reasons appear in this case to warrant review.

2. References to the opinion below follow the pagination in the appendix of the petition.

the school petitioner attended, Western College of Medicine, is not listed as an approved school. (Op. - xiv, text and n. 14.) Therefore, wholly apart from petitioner's failure of proof, the appellate court satisfied itself that the school which petitioner attended was *not* a school approved by the Board.

However, the District Court of Appeal did not rest with pointing out petitioner's utter failure of proof and its own affirmative demonstration that petitioner's school was unapproved. In a further effort to show that justice was done, the appellate court pointed out that the record makes abundantly clear *why* the school in question was not approved. It is from this discussion that petitioner attempts to torture a constitutional question.

At the administrative hearing, the Board of Medical Examiners did not rest its case, as it well could have, upon petitioner's failure of proof. Rather, the board affirmatively proved that Western College of Medicine, the school in question, had filed an application for approval, that a hearing had been held, and that said application was disapproved. The Findings of Fact, upon which the disapproval of the school was based, were introduced by respondent as an exhibit at the administrative hearing on this petitioner's application. The District Court of Appeal set forth these Findings in its opinion (Op. - xviii, n. 17). These Findings demonstrate that the quality of the resident courses, the adequacy of the clinic, the laboratory and equipment, and the caliber of instruction were all grossly sub-standard. Although conceding these exhibits went into evidence without objection, the petitioner complains that the board used them to make a Finding based on hearsay, in violation of California Government Code section 11513. (Pet. Cert. - 6-7.) However, even if this be error, the definition and use of hearsay is purely a matter of state law.

Moreover, the court correctly states that under California law hearsay evidence, to which no objection is made, may be considered in support of a finding. (See Op. xx and cases cited there.)

An elementary and fundamental principle of this Court's jurisdiction is that it will not review a state court decision unless a federal question was actually raised and decided and was necessary to the judgment of the court below. *Crowell v. Randell*, 10 Pet. 367, 397. This principle and its natural corollary that this Court is without jurisdiction where the judgment can in fact be sustained upon an adequate and independent state ground received what still must be its definitive exposition in *Murdock v. Memphis*, 20 Wall. 590, 635-636. These basic rules have been followed and elaborated upon repeatedly in cases such as *Moore v. Miss.*, 21 Wall. 636, 639; *Fox v. Mueller*, 296 U.S. 207, 210-211; *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206, 212; *Minn. v. National Tea Co.*, 309 U.S. 551, 556-557; *Williams v. Kaiser*, 323 U.S. 471, 477; *Herb v. Pitcairn*, 324 U.S. 117, 126; *Black v. Cutter Labs.*, 351 U.S. 292, 298-299; and, as recently as *Nick Jankovich v. Indiana Toll Rd. Comm'n*, 33 L.W. 4123 (Jan. 18, 1965). These principles and decisions are controlling here. In the absence of an attack on the constitutionality of requiring a prospective physician to take courses at a school approved by the Board of Medical Examiners (a patently reasonable requirement), the decision below is easily supported on any one of the following principles of state law:

(1) Petitioner failed in his burden of proof.

(2) By judicially noticing the absence of his school from the approved list, the appellate court determined petitioner could not possibly meet his burden of proof.

(3) The appellate court merely applied a rule of evidence allowing an administrative agency to make a finding of fact on unchallenged hearsay.

Within none of these questions lurk even the slightest trace of a federal constitutional question.

CONCLUSION

The petitioner for certiorari should be denied as not timely filed, as presenting no federal question, and for its flagrant disregard of the Rules of the Supreme Court.

Dated, San Francisco, California
February 4, 1965.

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